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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 RICK OLMSTEAD,

12 Plaintiff,

13 v.

14 THOMAS MODLY, Acting Secretary of  
the Navy,

15 Defendant.

CASE NO. C18-5989 RJB

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

16 This matter comes before the Court on Defendant's<sup>1</sup> Motion for Partial Summary  
17 Judgment. Dkt. 18. The Court has considered the pleadings filed in support of and in opposition  
18 to the motion and the file herein. For the reasons set forth below, Defendant's Motion for Partial  
19 Summary Judgment should be granted.  
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24 <sup>1</sup> Thomas Modly is now Acting Secretary of the Navy. Dkt. 18, at 1. Pursuant to Fed. R. Civ. P. 25(d), he is  
automatically substituted as the proper party.

1                   **I. RELEVANT FACTS AND PROCEDURAL HISTORY**

2                   **A. FACTS**

3                   Plaintiff is a civilian employee of the Department of the Navy (“Navy”). Dkt. 12.  
4                   Plaintiff worked for the Navy from 1976 until 1992, when he resigned after winning the lottery.  
5                   Dkt. 12. Plaintiff currently works for the Navy at the Puget Sound Naval Shipyard, having  
6                   started again in 2006. Dkt. 12. Plaintiff alleges that he was discriminated against based on his  
7                   age and disability. Dkt. 12. The operative complaint includes, in part, a failure to accommodate  
8                   claim against Defendant under the Rehabilitation Act of 1973 (“Rehabilitation Act”), 29 U.S.C.  
9                   § 701, *et seq.* Dkt. 12.

10                  In 2014, Plaintiff worked as a Nuclear Test Temporary Pipefitter Supervisor I (“NT  
11                  Supervisor”). Dkt. 12, at 3. Plaintiff was assigned to work the swing shift in Building 856, Shop  
12                  56, which is a pipefitting shop. Dkt. 12, at 3. Plaintiff allegedly provided medical documentation  
13                  to Defendant explaining that Plaintiff had a permanent medical condition due to his use of blood  
14                  thinners. Dkt. 12. Plaintiff explained to Defendant that, to continue to perform his job, he would  
15                  need a reasonable accommodation. Dkt. 12. Plaintiff allegedly requested that he be assigned to  
16                  work in areas and on shifts that would not include assigning him to work onboard ships or  
17                  submarines. Dkt. 12, at 3. Defendant allegedly granted his request for a reasonable  
18                  accommodation by assigning him to work as a NT Supervisor in Building 856 on swing and rear  
19                  shifts. Dkt 12, at 3.

20                  Plaintiff alleges that the Navy forced him to take a test to qualify for the Contamination  
21                  Control Supervisor Qualification (“Supervisor Qualification”). Dkt. 18. Plaintiff apparently had  
22                  previously held the Supervisor Qualification, but it had lapsed, and Plaintiff failed multiple  
23                  attempts to pass the Supervisor Qualification test. Dkts. 18; and 20. Plaintiff alleges that  
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1 “Defendant refused to keep Plaintiff in his position as NT Supervisor assigned to Building 856  
2 for swing and rear shifts without [a Supervisor Qualification] as a reasonable accommodation.”  
3 Dkt. 12, at 4. Plaintiff alleges that the Navy demoted Plaintiff from his supervisor position and  
4 reassigned Plaintiff to day shift, resulting in severe financial loss and detriment to Plaintiff’s  
5 career. Dkt. 12, at 4. Plaintiff contends that, as an NT Supervisor in Building 856, he was not  
6 required to work with radiological materials and did not need a Supervisor Qualification. Dkts.  
7 12; and 24.

8 Plaintiff alleges that, on December 17, 2014, Defendant denied Plaintiff a reasonable  
9 accommodation and required him to take the Supervisor Qualification exam, which he did not  
10 pass. Dkt. 12. On March 30, 2015, Defendant terminated Plaintiff’s temporary promotion as NT  
11 Supervisor and reassigned him to day shift from swing shift. Dkt. 12.

## 12 **B. PROCEDURAL HISTORY**

13 On April 8, 2015, Plaintiff requested Equal Employment Opportunity Counseling. Dkt.  
14 22. On July 23, 2015, Plaintiff filed a claim with the Equal Employment Opportunity  
15 Commission (EEOC). Dkt. 22. On September 21, 2018, the EEOC issued an Administrative  
16 Judge’s (“AJ”) decision that Plaintiff had not been discriminated against as alleged. Dkt. 22. On  
17 September 26, 2018, the Navy issued its Final Agency Decision, which provided that the Navy  
18 had received the AJ’s decision and that it “will be fully implemented as the Department of the  
19 Navy’s final action in this matter.” Dkt. 22-2, at 3. The Final Agency Decision provided  
20 information about the right to file suit within ninety days in United States District Court. Dkt. 22-  
21 2.

22 On November 30, 2018, Plaintiff filed an initial complaint. Dkt. 1. On April 1, 2019,  
23 Plaintiff filed an Amended Complaint, which is the operative complaint. Dkt. 12. The operative  
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1 complaint provides two causes of action against Defendant: (1) denial of a reasonable  
2 accommodation in violation of the Rehabilitation Act and (2) retaliation in violation of the  
3 Rehabilitation Act. Dkt. 12.

#### 4 **C. PENDING MOTION**

5 On January 15, 2020, Defendant filed the instant Motion for Partial Summary Judgment  
6 requesting dismissal with prejudice of Plaintiff's reasonable accommodation claim. Dkt. 18. On  
7 January 31, 2020, Plaintiff filed a response in opposition to the instant motion. Dkt. 24. On  
8 February 6, 2020, Defendant filed a reply in support of the instant motion. Dkt. 26.

### 9 **II. DISCUSSION**

#### 10 **A. SUMMARY JUDGMENT STANDARD**

11 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
12 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
13 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is  
14 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
15 showing on an essential element of a claim in the case on which the nonmoving party has the  
16 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of  
17 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for  
18 the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
19 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some  
20 metaphysical doubt."). *See also* Fed. R. Civ. P. 56(d). Conversely, a genuine dispute over a  
21 material fact exists if there is sufficient evidence supporting the claimed factual dispute,  
22 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby*,

1 *Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*  
2 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The court  
4 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –  
5 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*  
6 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor  
7 of the nonmoving party only when the facts specifically attested by that party contradict facts  
8 specifically attested by the moving party. The nonmoving party may not merely state that it will  
9 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial  
10 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson*, *supra*).  
11 Conclusory, non-specific statements in affidavits are not sufficient, and “missing facts” will not  
12 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89 (1990).

## 13 **B. REASONABLE ACCOMMODATION CLAIM**

### 14 1. Reasonable Accommodation Standard

15 The Rehabilitation Act incorporates the standards of the Americans with Disabilities Act  
16 of 1990 (“ADA”), 42 U.S.C. §2101, *et seq.*, for claims alleging nonaffirmative action  
17 employment discrimination. *See, e.g., Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 2006). In a  
18 disability discrimination claim based on failure to accommodate, a plaintiff must prove: (1) that  
19 he has a disability under the applicable statute; (2) that the federal agency had notice of his  
20 disability; (3) that he requested an accommodation due to his disability; (4) that he was a  
21 qualified individual able to perform the essential functions of his job with or without reasonable  
22 accommodations; and (5) that there were specific reasonable accommodations that the federal  
23 agency refused to provide. *See* 42 U.S.C. § 12112(b)(5)(A); *see also, e.g., Zivkovic v. S.*

1 *California Edison Co.*, 302 F.3d 1080, 1088–89 (9th Cir. 2002); *Memmer v. Marin Cty. Courts*,  
2 169 F.3d 630, 633 (9th Cir. 1999).

3 A plaintiff must show that he was qualified for the position at the time of the alleged  
4 discrimination. *Johnson v. Bd. of Trs. of Boundary Cty. Sch. Dist. No. 101*, 666 F.3d 561, 564–65  
5 (9th Cir. 2011). Courts use a two-step analysis to determine whether a plaintiff is otherwise  
6 qualified for a position: (1) he must have the requisite skills, experience, education, and other  
7 job-related requirements of the employment position such individual holds or desires, and (2)  
8 with or without reasonable accommodation, he must be able to perform the essential functions of  
9 the position. *Id.* at 565; 29 C.F.R. § 1630.2(m). “Unless a disabled individual independently  
10 satisfies the job prerequisites, she is not ‘otherwise qualified,’ and the employer is not obligated  
11 to furnish any reasonable accommodation that would enable her to perform the essential job  
12 functions.” *Johnson*, 666 F.3d at 565–66.

13 2. Reasonable Accommodation Analysis

14 Plaintiff has not shown that he is a qualified individual for the NT Supervisor position  
15 because he does not have the prerequisite Supervisor Qualification. *See Johnson*, 666 F.3d at 567  
16 (holding that a school board employer was not required by the ADA to accommodate a teacher’s  
17 disability by granting her request for provisional authorization to teach without a teaching  
18 certificate). Although Plaintiff contends that other supervisors were not required to have the  
19 Supervisor Qualification or that the Supervisor Qualification should not be necessary, Plaintiff  
20 does not show that NT Supervisors are not required to have the Supervisor Qualification. Instead,  
21 it appears to be Defendant’s policy that NT Supervisors are required to have the Supervisor  
22 Qualification. *See, e.g.*, Dkts. 20; 26, at 4; and 27-1, at 5. Plaintiff has not shown that he is  
23 otherwise qualified for the NT Supervisor position, nor does Plaintiff allege that the position’s  
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1 Supervisor Qualification requirement is itself discriminatory. Therefore, the Court should grant  
2 Defendant's Motion for Partial Summary Judgment.

3 Defendant further claims that Plaintiff has not established that asking for a waiver of the  
4 Supervisor Qualification constitutes a request for reasonable accommodation. Dkt. 26, at 5–7.  
5 Because the Court finds that Plaintiff is not a qualified individual for the NT Supervisor position,  
6 there is no need to reach that issue at this time.

7 **III. ORDER**

8 Therefore, it is hereby **ORDERED** that:

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  - Defendant's Motion for Partial Summary Judgment (Dkt. 18) is **GRANTED**.

10 Plaintiff's reasonable accommodation claim is **DENIED WITH PREJUDICE**.

11 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
12 to any party appearing pro se at said party's last known address.

13 Dated this 12<sup>th</sup> day of February, 2020.

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15 ROBERT J. BRYAN  
16 United States District Judge